RECORD AND BRIEFS

17-532

No. _____

In the
Supreme Court of the United States

CLAYVIN B. HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On Petition for Writ of Certiorari to the District Court of Wyoming, Sheridan County

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Wyoming's admission to the Union or the establishment of the Bighorn National Forest abrogated the Crow Tribe of Indians' 1868 federal treaty right to hunt on the "unoccupied lands of the United States," thereby permitting the present-day criminal conviction of a Crow member who engaged in subsistence hunting for his family.

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PETITION FOR WRIT OF CERTIORARI

This case presents an important question of federal law that has divided the lower courts and affects the livelihoods of thousands of Native Americans. In 1868, the United States and the Crow Tribe of Indians entered into a treaty pursuant to which the Tribe ceded to the federal government the majority of its aboriginal territory but retained a portion for the establishment of the Crow Reservation. To ensure that the Tribe could continue to engage in subsistence hunting on the ceded lands, the treaty provided that the Tribe "shall have the right to hunt on the unoccupied lands of the United States." For well over a century, Crow Tribe members have relied on that binding language to hunt on off-reservation lands, including in the Bighorn National Forest, which is adjacent to the Crow Reservation and was established in 1897 from lands that the Tribe ceded to the United States.

Petitioner Clayvin Herrera is a member of the Crow Tribe. In January 2014, Petitioner and other Tribe members went hunting on the Crow Reservation, which is located in southern Montana and shares Montana's southern border with Wyoming. After spotting a small herd of elk, the group pursued the animals, eventually crossing from the Reservation into the Bighorn National Forest, which is located in northern Wyoming and shares Wyoming's northern border with Montana. The group shot and killed three elk in that federal forest, and carried the meat back to the Reservation to help feed their families and other members of the Tribe over the winter.

Notwithstanding the federal treaty rights reserved to Petitioner and the Crow Tribe, the state of Wyoming convicted Petitioner of two crimes under Wyoming law for unlawfully hunting elk in the Bighorn National Forest. A Wyoming trial court prohibited Petitioner from asserting the treaty right as a bar to prosecution, and a Wyoming appellate court affirmed. Both courts relied exclusively on a 1995 Tenth Circuit decision that concluded that the Tribe's treaty-protected hunting rights were categorically abrogated by Wyoming's 1890 admission to the Union or, alternatively, by the 1897 establishment of the Bighorn National Forest, which ostensibly rendered those lands no longer "unoccupied." The Wyoming Supreme Court denied review.

The judgment below cannot stand. Nothing has abrogated the Tribe's off-reservation hunting rights reserved under the 1868 Treaty. Wyoming's statehood did not terminate the Crow Tribe's rights, because this Court held after the Tenth Circuit's decision that Indian "[t]reaty rights are not impliedly terminated upon statehood." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 207 (1999). And as the Ninth Circuit and multiple state supreme courts have held, the establishment of a national forest does not render that land "occupied" so as to abrogate Indian treaties reserving similar rights. Indeed, the federal statute authorizing the creation of federal forests expressly *prohibited* abrogation of Indian treaties. And the 1897 proclamation establishing the Bighorn National Forest precluded "entry or settlement" on the land, which is the very opposite of rendering that land "occupied."

The decision below and the Tenth Circuit decision upon which it relied are both profoundly wrong and in conflict with this Court's precedent and the decisions of numerous other lower courts. Certiorari is thus warranted—and imperative. The answer to the question presented—whether the 1868 Treaty has been abrogated—will determine whether Crow Tribe members, and all other Native Americans subject to treaties with similar language, can exercise long-established rights integral to their identity and well-being. And as this very case makes clear, members of the Tribe, including Petitioner, depend upon their treaty-protected hunting rights to feed their families to this day. If the Tribe's federal treaty rights are to be the "supreme Law of the Land" no more, U.S. Const. art. VI, cl. 2, and a state can criminally prosecute and convict a Tribe member for engaging in what the plain language of the treaty expressly protects, all based on reasoning that other courts have repudiated, then at least this Court should be the one to make that determination. In all events, the need for this Court's review is plain.

OPINIONS BELOW

The order of the Wyoming Supreme Court denying review is unreported but reproduced at App.1-2. The opinion of the Wyoming District Court is unreported but reproduced at App.3-35. The opinion of the Wyoming Circuit Court is unreported but reproduced at App.36-43.

JURISDICTION

The Wyoming District Court entered judgment on April 25, 2017. Petitioner filed a timely petition for review with the Wyoming Supreme Court, which was

denied on June 6, 2017. On August 9, 2017, Justice Sotomayor extended the time for filing this petition to and including October 5, 2017. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent portions of the Supremacy Clause, U.S. Const. art. VI, cl. 2; Article IV of the Treaty with the Crow Indians, May 7, 1868, 15 Stat. 649; the Act to Repeal Timber-Culture Laws, §§10, 24, 26 Stat. 1095 (1891) ("Forest Reserve Act"); and President Cleveland's proclamation establishing the Bighorn National Forest, Proclamation No. 30, 29 Stat. 909 (Feb. 22, 1897), are reproduced at App.44-48.

STATEMENT OF THE CASE

A. Background

1. In the nineteenth century, the territory controlled by the Crow Tribe of Indians was vast, stretching across tens of millions of acres and including large parts of what are now the states of Montana and Wyoming. *See Montana v. United States*, 450 U.S. 544, 547-48 (1981). That situation changed in 1868, when the U.S. government and the Tribe signed a treaty, which was ratified by the Senate and signed by President Andrew Johnson. *See* Treaty with the Crow Indians, May 7, 1868, 15 Stat. 649 ("1868 Treaty"). Under the 1868 Treaty, the United States created the Crow Indian Reservation in present-day southern Montana from roughly 8 million acres of the Tribe's land, and the Tribe ceded the remainder of its aboriginal territory to the United States in exchange for payments, goods, and federal protection of its members and remaining lands. *Id.*

art. IV-XII, 15 Stat. at 650-52; *see also Montana*, 450 U.S. at 547-48.

The 1868 Treaty also guaranteed certain hunting rights for the Tribe beyond the boundaries of the Reservation. Specifically, Article IV of the treaty provided that the Tribe "shall have the right to hunt on the unoccupied lands of the United States" that the Tribe had ceded—including lands in present-day Wyoming—"so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." 1868 Treaty, art. IV, 15 Stat. at 650. Those hunting rights were central to the Tribe's ability to provide for itself, and the agreement's reference to "unoccupied lands" accommodated the interests of non-Indian settlers who were expected to eventually arrive and settle on portions of the Tribe's ceded lands. *See* R.249-51.[1]

Over the next half-century, Congress ratified a number of other agreements that further diminished the Crow Reservation. But in those agreements, Congress made clear that the rights reserved by the Tribe under the 1868 Treaty remained in effect, except as specifically modified. *See, e.g.*, Appropriations Act of Mar. 3, 1891, 26 Stat. 989, 1042 (providing that "all existing provisions of the treaty of May seventh Anno Domini eighteen hundred and sixty-eight ... shall continue in force"); *accord* Act of Apr. 27, 1904, art. VII, 33 Stat. 352, 355 ("The existing provisions of all former treaties with the Crow tribe of Indians not inconsistent with the provisions of this agreement, are

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[1] "R." refers to the record on appeal before the Wyoming District Court.

hereby continued in force and effect."). None of those agreements altered the rights of Tribe members to hunt on the lands that the Tribe had ceded in 1868.

2. In 1890, the Wyoming Territory became the state of Wyoming. *See* Wyoming Statehood Act, 26 Stat. 222 (1890). At that time, the federal government made a number of land grants to the new state. *See, e.g.*, *id.* §§4, 6, 8-11, 26 Stat. at 222-24. As was common practice with many new states in the American West, however, the federal government never ceded title to wide swaths of other land in Wyoming. *See id.* §12, 26 Stat. at 224 ("That the State of Wyoming shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act."); *see also* Wyo. Const. art. XXI, §26 ("The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof.").[2] Among the lands that remained federally owned after Wyoming's statehood were the lands that the Tribe had ceded in the 1868 Treaty.

3. In 1891, Congress enacted a statute—commonly known as the "Forest Reserve Act"—that gave the President the power to establish forest preserves from federal lands in the public domain. Act to Repeal Timber-Culture Laws, §24, 26 Stat. 1095, 1103 (1891) ("Forest Reserve Act"). That statute included express anti-abrogation language, providing that "nothing in this act shall change, repeal, or

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[2] The federal government continues to own 48.4% of all land in Wyoming. *See* Carol Hardy Vincent et al., Cong. Research Serv., *Federal Land Ownership: Overview and Data* 9 (2017).

modify any agreements or treaties made with any Indian tribes for the disposal of their lands." *Id.* §10, 26 Stat. at 1099. Thus, under the Forest Reserve Act, when a President establishes a national forest from federal lands that were previously ceded by an Indian tribe, the tribe and its members retain the rights reserved by any earlier treaty that remains good law.

In 1897, pursuant to the 1891 statute, President Grover Cleveland issued a proclamation establishing the Big Horn (now Bighorn) National Forest from federal land in northern Wyoming—*i.e.*, the area constituting the Tribe's aboriginal hunting grounds, which the Tribe had ceded to the federal government in 1868. Proclamation No. 30, 29 Stat. 909 (Feb. 22, 1897). The proclamation explicitly "reserved from entry or settlement" that land, *id.* at 909, and made clear that all persons were prohibited from occupying the land from that moment forward: "Warning is hereby expressly given to all persons not to enter or make settlement upon the tract of land reserved by this proclamation," *id.* at 910. The Bighorn National Forest has remained a federal forest ever since. *See, e.g.*, 16 U.S.C. §475.

4. Between 1868 and 1995, members of the Crow Tribe continuously hunted in the Bighorn National Forest, almost entirely free of state interference.[3] R.251. In 1995, however, the Tenth Circuit upset those longstanding expectations in *Crow Tribe of*

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[3] In the early 1970s, Wyoming attempted to prosecute a member of the Crow Tribe for killing a deer in the Bighorn National Forest. After the U.S. Department of Interior's Field Solicitor intervened on the defendant's behalf, the state court dismissed the charges. R.251.

Indians v. Repsis, 73 F.3d 982, 992 (10th Cir. 1995). In *Repsis*, the Tenth Circuit—relying on this Court's decision in *Ward v. Race Horse*, 163 U.S. 504 (1896)—held that the "Tribe's right to hunt reserved in" the 1868 Treaty was "repealed by the act admitting Wyoming into the Union." *Id.* at 992 (citing *Race Horse*, 163 U.S. at 514); *see also id.* at 994 (concluding that Tribe's right to hunt "was repealed with Wyoming's admission into the Union"). The Tenth Circuit also concluded, in a brief "alternative basis for affirmance," that the treaty rights were abrogated by the establishment of the Bighorn National Forest, which "resulted in the 'occupation' of the land." *Id.* at 993.

Four years later, however, in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), this Court held that the principal theory on which *Repsis* (and *Race Horse*) rested—abrogation upon admission to the Union under the so-called "equal footing" doctrine—was no longer good law. *See id.* at 204-07. The Court also rejected the reasoning of *Race Horse* as "too broad to be useful." *Id.* at 206-07. Finally, it held that rights preserved in Indian treaties continue in force until the occurrence of an event "clearly contemplated" by the treaty, and that "[t]reaty rights are not impliedly terminated upon statehood." *Id.*

After concluding that *Mille Lacs* had repudiated the Tenth Circuit's *Repsis* decision, the Crow Tribal Legislature unanimously passed a joint resolution that marked a return to the pre-*Repsis* scope of the Tribe's off-reservation hunting rights under the 1868 Treaty. R.251-52.

B. Petitioner's Prosecution, the Pre-trial Proceedings, and Petitioner's Trial

1. Petitioner Clayvin Herrera is an enrolled member of the Crow Tribe who lives in St. Xavier, Montana, on the Crow Reservation. In January 2014, Petitioner and other members of the Tribe went hunting on the Reservation in Montana, hoping to obtain meat to feed their families and other Tribe members in the dead of winter. R.838. The group spotted a small herd of elk on the Reservation and, while pursuing the herd, crossed the state line into the Bighorn National Forest in Wyoming. The group shot and killed three elk and quartered, packed, and carried them back to the Reservation to feed Tribe members.[4]

After learning about the January 2014 elk hunt, and notwithstanding the 1868 Treaty, Wyoming authorities traveled to the Reservation in Montana to cite Petitioner for two criminal misdemeanors under Wyoming law—one for taking an antlered big game animal during a closed-hunting season, and the other for being an accessory to the same. Wyo. Stat. §§23-3-102(d), 23-6-205.[5]

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[4] Herrera used the elk to feed his three young daughters elk spaghetti and elk "Hamburger Helper" throughout the winter. The three elk were a small part of the large herd that the trial court recognized "migrate[s] in the Big Horn Mountains between the [Bighorn National Forest] and the Crow Reservation." App.42.

[5] It is undisputed that the federal government allows year-round treaty hunting in the national forests, and that January is not a closed season for elk hunting under the Crow Tribe's fish-and-game laws. R.125; R.591.

2. After pleading not guilty and waiving his right to a speedy trial, Petitioner moved to dismiss the charges against him, arguing that the 1868 Treaty allowed him to hunt in the Bighorn National Forest, thereby rendering him immune from criminal prosecution. The state of Wyoming opposed the motion, contending as relevant here that the hunting rights guaranteed under the 1868 Treaty were abrogated either by Wyoming's 1890 statehood or by the 1897 establishment of the Bighorn National Forest.

In October 2015, the Wyoming Circuit Court denied Petitioner's motion to dismiss. The court declared itself "bound by" the Tenth Circuit's holding in *Repsis* that "Crow Tribe members do not have off-reservation treaty hunting rights anywhere within the state of Wyoming." App.38. The court added that this Court's *Mille Lacs* decision "had no effect on the *Repsis* decision." App.39. The trial court thus denied Petitioner immunity as a matter of law without even conducting a hearing, and precluded Petitioner from even mentioning at trial his federal treaty right to hunt elk in the Bighorn National Forest. App.43.

Petitioner filed an interlocutory appeal to the Wyoming District Court.[6] On April 5, 2016, the

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[6] The Wyoming District Courts are the trial courts of general jurisdiction in the state, but they also serve as the appellate courts to the Circuit Courts, which have jurisdiction over all misdemeanor cases. Review of District Court decisions may only be had in the Wyoming Supreme Court. Wyoming does not have an intermediate appellate court system. *See, e.g.*, *About The District Courts*, Wyo. Judicial Branch, http://bit.ly/2xd73ik (last visited Oct. 3, 2017).

district court dismissed the appeal for lack of jurisdiction, holding that the order was not appealable under the collateral order doctrine. Petitioner then asked the Wyoming Supreme Court for review of that decision and a stay of his criminal trial (scheduled for April 27). After the Wyoming Supreme Court failed to act, Petitioner sought an emergency stay of his trial from Justice Sotomayor. *See* No. 15A1105. On April 26, the Wyoming Supreme Court and Justice Sotomayor nearly concurrently denied his requests for a stay. The Wyoming Supreme Court did not act on Petitioner's petition for review of his immunity appeal before the trial date.[7]

A jury trial was held over three days. With Petitioner unable even to mention the 1868 Treaty, the verdict came swiftly; he was convicted on both charges. App.9. Petitioner was fined $8,000, received a one-year suspended jail sentence, and had his hunting privileges suspended for three years. *Id.*

C. The Wyoming District Court's Decision

Following his conviction, Petitioner again appealed to the Wyoming District Court, again arguing that the hunting rights guaranteed by the 1868 Treaty afforded him immunity from criminal prosecution. Following briefing, the court *sua sponte* requested supplemental briefing on the question whether principles of collateral estoppel bound Petitioner, a member of the Crow Tribe, to the 1995 *Repsis* decision, in which the Crow Tribe was a party.

The district court affirmed. Recognizing the "issue in this case" as "the continued validity of the off-

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[7] That petition was ultimately denied on May 10, 2016.

reservation treaty hunting right," App.13, the court concluded that, as a matter of collateral estoppel, Petitioner was bound by *Repsis*, App.31. The court acknowledged that federal law controlled the collateral estoppel question, and that under that federal law, collateral estoppel does not apply when there has been an "intervening change in the applicable legal context." App.19 (quoting Restatement (Second) of Judgments §28 (1982)). The court nevertheless held that the intervening *Mille Lacs* decision had not fatally undercut *Repsis*. It conceded that *Mille Lacs* repudiated the vast majority of the reasoning in the 1896 *Race Horse* decision on which *Repsis* was "largely based." App.21. But it concluded that *Repsis* still controlled because *Mille Lacs* purportedly left undisturbed an "alternative holding" announced in *Race Horse* and mentioned in *Repsis*—*viz.*, that treaty rights may be abrogated if they are only "temporary and precarious" rights. App.22-24. Accordingly, the district court concluded that Petitioner could not "relitigate the validity of the off-reservation treaty hunting right that was previously held to be invalid in the *Repsis* case." App.31.

The district court also announced an "alternative" holding "[e]ven if collateral estoppel did not apply." App.31. Its "alternative" analysis, however, simply repeated its earlier reasoning that *Mille Lacs* did not fatally undercut *Race Horse* or *Repsis*. Rather, the district court believed, *Mille Lacs* reaffirmed that courts must "look at the language in the treaty to determine whether it was intended to be perpetual." App.34. According to the district court, *Race Horse* conducted that analysis and "concluded that the rights

granted in the treaty [at issue there] were temporary in nature, and they were not intended to survive ... statehood." App.32. "Similarly," the court continued, the *Repsis* court "found that 'the Tribe's right to hunt reserved in the Treaty with the Crows, 1868, was repealed by the act admitting Wyoming into the Union,'" and "alternatively held that the treaty rights were no longer valid, because 'the creation of the Big Horn National Forest resulted in the "occupation" of the land.'" App.33. The "analysis and conclusions of the *Repsis* case," the district court concluded, were "appropriate," App.34; accordingly, it was "proper" for the trial court to have prohibited Petitioner from asserting the 1868 Treaty as a bar to his prosecution. *Id.*

Petitioner timely filed a petition for writ of review with the Wyoming Supreme Court, which was denied without explanation in a one-page order. App.1-2.

REASONS FOR GRANTING THE PETITION

A Wyoming state court has upheld Petitioner's criminal conviction by declaring Native American rights enshrined in a 149-year-old federal treaty extinct. The decision below ignores this Court's precedents, badly misconstrues the Tribe's 1868 Treaty, and creates a clear split with federal and state courts, all while imperiling the ability of Tribe members to provide for their families as they—and other Native Americans, pursuant to similar treaties—have done for over a century. Only this Court can correct this injustice, resolve the unsettled case law, and reaffirm the federal treaty-based rights that the Tribe and other Native Americans have long enjoyed.

Nothing has abrogated the Tribe's treaty right to hunt on "unoccupied" federal lands, including in the Bighorn National Forest where Petitioner was engaged in subsistence hunting. The court below relied on the Tenth Circuit's *Repsis* decision, which invoked this Court's *Race Horse* decision to conclude that the rights preserved in the 1868 Treaty were abrogated by Wyoming's admission to the Union in 1890 and by the 1897 establishment of the Bighorn National Forest. But this Court's superseding decision in *Mille Lacs* rejected *Race Horse*'s reasoning and conclusively held that "[t]reaty rights are not impliedly terminated upon statehood." 526 U.S. at 207. And President Cleveland's proclamation establishing the Bighorn National Forest—issued pursuant to a federal statute expressly disclaiming the abrogation of treaties with Native Americans—explicitly *prohibited* "entry or settlement" in that land, thus foreclosing the oxymoronic proposition that creation of the national forest rendered the land "occupied" within the meaning of the 1868 Treaty. Unsurprisingly, there is no evidence that either of the parties to the 1868 Treaty had that understanding of the relevant language, and much evidence to the contrary.

The profoundly incorrect decision below has only added to the split that *Repsis* created with other federal courts of appeals and state high courts, rendering the need for this Court's review even more clear. Contrary to the Tenth Circuit and the decision below, the Ninth Circuit has squarely rejected the notion that the Forest Reserve Act that led to the establishment of the Bighorn National Forest gave the President the power to extinguish Indian treaty

rights. Moreover, multiple state high courts interpreting materially indistinguishable provisions in other Indian treaties have concluded that *Race Horse* (upon which *Repsis* relied) is no longer good law and that national forests are not occupied land.

This case therefore cries out for this Court's review, and this is an ideal vehicle to resolve the exceptionally important federal question it presents. The relevant facts are undisputed, and the issue was exhaustively argued and addressed at multiple stages of the state proceedings. Though the decision below rejected Petitioner's claim by invoking *Repsis* and collateral estoppel, that presents no bar to review, since under well-established federal-law principles, a "change in the applicable legal context" precludes application of the doctrine. *Bobby v. Bies*, 556 U.S. 825, 834 (2009). *Mille Lacs* undoubtedly changed the applicable legal context, but regardless, whether it did so *vel non* is part and parcel of the question presented on the merits. Because the Court's answer to the question presented will also answer whether there was a change in the applicable legal context that defeats collateral estoppel, the latter doctrine poses no obstacle to certiorari.

In short, this Court need only answer the clean legal question of whether the 1868 Treaty has been abrogated or not. If the answer to that question is yes, and the Tribe's federal treaty rights persist notwithstanding Wyoming's admission to the Union and the creation of the Bighorn National Forest, the judgment below must be reversed, regardless of collateral estoppel principles. But if the answer to that question is no, and Petitioner and other Tribe

members—to say nothing of other Native Americans subject to similar treaties—really can be criminally prosecuted for attempting to provide for their families despite a century-old treaty indicating otherwise, they are entitled to have this Court, not a state court, render that extraordinary judgment. In either case, the Court's intervention is warranted.

I. The Decision Below Is Profoundly Wrong.

The Crow Tribe's 1868 Treaty with the United States provides that the Tribe "shall" have the continuing "right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." 1868 Treaty, art. IV, 15 Stat. at 650. The Wyoming District Court nonetheless concluded that Petitioner and other members of the Tribe have *no* right whatsoever to hunt in the Bighorn National Forest. The court reached that categorical result after relying exclusively on the Tenth Circuit's *Repsis* decision, which concluded, first, that Wyoming's 1890 admission to the Union abrogated the Tribe's right to hunt on unoccupied federal lands in Wyoming, *see* 73 F.3d at 992-93; and, alternatively, that the Bighorn National Forest ceased to be "unoccupied" when President Cleveland proclaimed it a national forest in 1897, thereby abrogating the Tribe's hunting rights, *id.* at 993. Each of these grounds is profoundly wrong, as is, consequently, the district court's decision relying on *Repsis*.

A. Wyoming's Admission to the Union Did Not Abrogate the Crow Tribe's Treaty Rights.

Petitioner need not belabor the point that Wyoming's admission to the Union in 1890 did not extinguish his right under the 1868 Treaty to hunt in the Bighorn National Forest. Under this Court's precedents, the notion that statehood impliedly abrogates Indian treaty rights—the first basis for the *Repsis* decision—is no longer good law.

In 1896, this Court in *Race Horse* examined a provision of the 1869 treaty between the Bannock Tribe of Indians and the United States, which reserved for members of that Tribe "the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts," 163 U.S. at 507—*i.e.*, a provision worded identically to Article IV of the Crow Tribe's 1868 Treaty. The Court concluded that Wyoming's admission to the Union in 1890 abrogated the Bannock's right to hunt upon unoccupied federal lands under the so-called the "equal footing" doctrine, the principle that new states "are endowed with powers and attributes equal in scope to those enjoyed by the states already admitted," including the right to regulate hunting within their borders. *Id.* at 514-15. In applying that doctrine, the Court determined that the Bannock's hunting right and Wyoming's right to regulate hunting were in "irreconcilable" conflict, and thus concluded that the Bannock's hunting right had been impliedly abrogated by Wyoming's subsequent statehood. *Id.* at 514. The Court also noted that the

Bannock treaty had reserved only a "temporary and precarious" right to hunt on federal lands that was not "intended" to survive statehood. *Id.* at 515.

Just over a century later, in 1999, this Court thoroughly repudiated *Race Horse*. In *Mille Lacs*, the Mille Lacs Band of Chippewa Indians brought suit against the state of Minnesota seeking a declaration that they retained hunting rights under an 1837 federal treaty between several Chippewa Bands of Indians and the federal government. 526 U.S. at 185. That treaty preserved for the Chippewa the "privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded" by those Indians to the United States. *Id.* at 177. Relying on *Race Horse*, Minnesota contended that its admission to the Union in 1858 terminated those Indian treaty rights. *Id.* at 202-03.

The Court resoundingly rejected that argument, declaring that "statehood by itself is insufficient to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries." *Id.* at 205. More broadly, the Court held, Indian "[t]reaty rights are not impliedly terminated upon statehood." *Id.* at 207. The Court explained that *Race Horse* had incorrectly reached the opposite conclusion by relying on the "false premise" that treaty-protected hunting rights "conflict[] irreconcilably with state regulation of natural resources." *Id.* at 204. To the contrary, the Court explained, those two interests are entirely reconcilable: States may regulate treaty-protected hunters, but only when doing so is necessary as a "conservation" measure, as the Court had concluded in several decisions in the decades following *Race Horse*.

Id. at 204-05 (citing *Washington v. Wash. State Comm. Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), and *Antoine v. Washington*, 420 U.S. 194, 207-08 (1975)).

Having disposed of the "equal footing" doctrine of *Race Horse* as a basis for abrogating treaties with Native Americans, the Court then addressed the dissent's objection that *Race Horse* established a rule that certain "temporary and precarious" treaty rights "are not intended to survive statehood." *Id.* at 206. The Court rejected this argument, too, holding that "the 'temporary and precarious' language in *Race Horse* is too broad to be useful." *Id.* As the Court noted, "any right created by operation of federal law could be described as 'temporary and precarious,' because Congress could eliminate the right whenever it wished." *Id.* at 207. In short, "the line suggested by *Race Horse* is simply too broad to be useful as a guide to whether treaty rights were intended to survive statehood." *Id.* Instead, the Court observed, the "focus" must be on those conditions or events (if any) that the parties themselves intended to serve as "fixed termination point[s]" abrogating treaty rights. *Id.* at 207. Using *Race Horse* as an example, the Court explained that the treaty there "'clearly contemplated'" that "the rights would continue only so long as the hunting grounds remained unoccupied and owned by the United States." *Id.* (quoting *Race Horse*, 163 U.S. at 509). But "there is nothing inherent in the nature of reserved treaty rights to suggest that they can be extinguished by *implication* at statehood." *Id.*

Mille Lacs squarely forecloses the proposition that Wyoming's admission to the Union terminated the

Crow Tribe's treaty-protected right to hunt on unoccupied federal lands, including in the Bighorn National Forest. And it just as squarely abrogates the principal ground relied upon by the *Repsis* decision (the only decision invoked by the district court here). *Repsis* unambiguously held that "[t]he Tribe's right to hunt reserved in the [1868 Treaty] was repealed by the act admitting Wyoming into the Union." 73 F.3d at 992. Indeed, for good measure, it declared *Race Horse* "compelling, well-reasoned, and persuasive," and it cited *Race Horse* for the proposition that the hunting right preserved in the 1868 Treaty was a "temporary right" that was "repealed with Wyoming's admission into the Union." *Id.* at 994. *Mille Lacs* rejects that reasoning across the board, from the notion that statehood abrogates treaty hunting rights to the "too broad" construct of "temporary" rights. 526 U.S. at 206; *see also id.* at 219 (Rehnquist, C.J., dissenting) (stating that "the Court ... effectively overrules *Race Horse*"); *State v. Buchanan*, 978 P.2d 1070, 1083 (Wash. 1999) ("[T]he United States Supreme Court effectively overruled *Race Horse* in *Minnesota v. Mille Lacs*.").

Furthermore, because the relevant language of the 1868 Treaty is identical to that of the treaty addressed in *Race Horse* and re-examined in *Mille Lacs*, the *Mille Lacs* decision also confirms what the parties to the 1868 Treaty "'clearly contemplated'" as conditions for preservation of the Tribe's hunting rights. 526 U.S. at 207. Specifically, the parties "contemplated that the rights would continue only so long as [1] the hunting grounds remained unoccupied and [2] owned by the United States." *Id.* The conditions also included that "[3] game may be found

thereon, and ... [4] peace subsists among the whites and Indians on the borders of the hunting districts." 1868 Treaty, art. IV, 15 Stat. at 650. These are the four conditions relevant to assessing the Tribe's continued hunting rights—not Wyoming's statehood *vel non*. And each of those conditions remains fulfilled to this day.

B. The Establishment of the Bighorn National Forest Did Not Abrogate the Crow Tribe's Treaty Rights.

Repsis and the decision below provided only one other basis for categorically abrogating the Tribe's treaty right to hunt in the Bighorn National Forest: Those formerly unoccupied federal lands became "occupied" simply by virtue of being declared a national forest in 1897. App.22. As *Repsis* put it, because the land comprising the Bighorn National Forest was "no longer available for settlement," creation of the forest "resulted in the 'occupation' of the land." 73 F.3d at 993. That reasoning "sounds absurd, because it is." *Sekhar v. United States*, 133 S. Ct. 2720, 2727 (2013).

President Cleveland's 1897 proclamation establishing the Bighorn National Forest expressly "reserved from entry or settlement" the land comprising the forest, and warned "all persons not to make settlement upon" the land. Proclamation No. 30, 29 Stat. at 909-10.[8] By barring "entry or settlement"

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[8] The *Repsis* court stated that "Congress created" the Bighorn National Forest "in 1887." That assertion is wildly inaccurate and emblematic of the court's haphazard approach to this issue. In *1891*, Congress enacted the Forest Reserve Act, which gave the President the power to establish national forests. Pursuant

on the land constituting the new national forest, the proclamation accomplished just the opposite of "occupation." No ordinary English speaker would understand a *prohibition* on the entry or settlement of vast, empty, and undisturbed land to mean that the land suddenly became "occupied."

Plain English aside, Indian treaties are interpreted "to give effect to the terms as the *Indians themselves* would have understood them." *Mille Lacs*, 526 U.S. at 196. The record in this case demonstrates that like "other Western Indians," the Crow Tribe understood "unoccupied lands of the United States" in the 1868 Treaty to mean "land undeveloped by white settlers." R.250. In other words, the "'clearly contemplated event'" terminating the Tribe's hunting rights, *Mille Lacs*, 526 U.S. at 207, was actual, physical settlement of its aboriginal hunting grounds—not a sort of metaphysical "occupation" by non-settlement. There is certainly "no evidence" that the Tribe "understood [the] fine legal distinctions" that the *Repsis* court purported to draw, and which the court below validated. *Id.* at 206. In any event, even if the phrase "unoccupied lands of the United States" were somehow ambiguous, the ambiguity must be resolved *in favor* of the Crow Tribe—not against it. *See id.* at 200 (explaining that that "Indian treaties are to be interpreted liberally in favor of the Indians," and "ambiguities are to be resolved in their favor").

Finally, President Cleveland's proclamation establishing the Bighorn National Forest could not

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to that statute, in *1897*, President Cleveland established the Bighorn National Forest via proclamation.

have abrogated the Tribe's hunting rights under the 1868 Treaty because the President lacked the authority to do so. The President's "power, if any, to issue" the proclamation must have stemmed "either from an act of Congress or from the Constitution itself." *Id.* at 188-89 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)). When President Cleveland established the Bighorn National Forest in 1897, he did so pursuant to a single act of Congress: the Forest Reserve Act. *See* Proclamation No. 30, 29 Stat. at 909. That statute delegated authority to the President "to set apart and reserve" the "public land[s]" in "any State or Territory" so long as those lands were "bearing forests." Forest Reserve Act, §24, 26 Stat. at 1103. But in enacting that statute, Congress made crystal clear its intent regarding Indian treaty rights: "[N]othing in this act shall change, repeal, or modify any ... treaties made with any Indian tribes for the disposal of their lands." *Id.* §10, 26 Stat. at 1099.

Congress thus explicitly *barred* the President from abrogating Indian treaty rights in establishing national forests. Moreover, Congress' prohibitive language was the opposite of the "clear and plain" intent that is required before it (or anyone else) may abrogate Indian treaties. *United States v. Dion*, 476 U.S. 734, 738 (1986). Accordingly, even if President Cleveland had sought to render the Crow Tribe's aboriginal hunting grounds "occupied" via his proclamation, he lacked the legal authority to abrogate the Tribe's treaty rights in the process. *See Mille Lacs*, 526 U.S. at 189-90 (concluding that Removal Act did not authorize presidential order terminating Chippewa hunting rights).

But there is no need to ascribe such motives to President Cleveland or his proclamation. As a matter of ordinary English and common sense, prohibiting "entry or settlement" on land does not cause that land to become "occupied." And there is no evidence that the Crow Tribe—or anyone—thought otherwise when the 1868 Treaty was ratified or when the Bighorn National Forest was established.

II. Courts Are Divided Over Whether Indian Treaty Rights Apply On Federal Lands Later Proclaimed National Forests.

In light of the errors in *Repsis* and the decision below relying upon it, it is unsurprising that those two cases are on the wrong side of a split of authority that only this Court can resolve. To begin with, the decision below rejected the proposition that *Mille Lacs* "'effectively overrule[d] *Race Horse*.'" App.24 n.6 (quoting 526 U.S. at 219 (Rehnquist, C.J., dissenting)). Other courts, however, have correctly recognized that this Court "effectively overruled *Race Horse* in ... *Mille Lacs*." *Buchanan*, 978 P.2d at 1083.

Furthermore, in contrast to *Repsis* and the decision below, other federal courts of appeals and state supreme courts have concluded that the Forest Reserve Act cannot be invoked to abrogate Indian treaty rights and that national forests remain "unoccupied" federal lands. In *Swim v. Bergland*, 696 F.2d 712 (9th Cir. 1983), for example, the Ninth Circuit addressed an 1898 treaty in which the Shoshone-Bannock Tribes ceded lands in Idaho to the United States but reserved the rights "to cut timber for their own use, ... to pasture their livestock on said public lands, and to hunt thereon and to fish in the

streams thereof." *Id.* at 714. In 1907, pursuant to the Forest Reserve Act, President Theodore Roosevelt issued a proclamation declaring those lands the Port Neuf Forest Reserve (later known as the Caribou National Forest). *Id.* Decades later, non-Indian plaintiffs argued that the rights in the 1898 treaty had "been extinguished by" Roosevelt's "executive action." *Id.* at 715. Specifically, they argued that the Forest Reserve Act, having "empower[ed] the President to withdraw public lands from settlement," also "gave him the power to *extinguish* Indian treaty rights in those lands." *Id.* at 717 (emphasis added).

In contrast to the Tenth Circuit in *Repsis* and the decision below, the Ninth Circuit squarely "reject[ed] that reading of the [Forest Reserve] Act." *Id.* The plaintiffs had not identified "any congressional enactment which purports to abrogate the Tribes' treaty rights," nor "any post-[treaty] delegation by Congress to the President of authority to abrogate Indian treaty rights without congressional consent." *Id.* at 718; *see also Kimball v. Callahan*, 493 F.2d 564, 570 (9th Cir. 1974) (holding that treaty-preserved hunting, trapping, and fishing rights apply on "land now constituting United States national forest land").

Numerous state courts of last resort have also concluded that national forestland is unoccupied, open, and unclaimed within the meaning of various Indian treaties. In *State v. Tinno*, 497 P.2d 1386 (Idaho 1972), the Supreme Court of Idaho considered an 1868 Treaty between the United States and the Eastern Band Shoshone and Bannock Tribes, which preserved fishing rights on the "unoccupied lands of the United States." *Id.* at 1389-90. The defendant, a

member of the Shoshone-Bannock Tribes, had been prosecuted by Idaho for fishing in the Challis National Forest. *Id.* at 1391. In addressing whether those lands fit within the scope of the treaty, the court concluded that "[a] plain reading of the treaty provision would lead to the conclusion that there is no serious geographical question presented." *Id.*; *see also State v. Arthur*, 261 P.2d 135, 141 (Idaho 1953) (concluding that "the National Forest Reserve upon which the game in question was killed was 'open and unclaimed land'").

Likewise, in *State v. Stasso*, 563 P.2d 562 (Mont. 1977), the Montana Supreme Court addressed whether an 1885 treaty between the United States and the Confederated Salish and Kootenai Indian Tribes guaranteed "present day members of the ... Tribes ... a right to hunt ... on 'open and unclaimed lands.'" *Id.* at 563. In particular, the court considered "whether Forest Service land may be included within the meaning of 'open and unclaimed lands.'" *Id.* The court answered that question in the affirmative: "[T]he National Forest lands involved herein are open and unclaimed lands." *Id.* at 565.

Finally, in *Buchanan*, the Supreme Court of Washington also concluded that "open and unclaimed" lands include national forestland. *See* 978 P.2d at 1081 (citing *State v. Miller*, 689 P.2d 81, 82 n.2 (Wash. 1984) (en banc)). Indeed, that court specifically noted that it had aligned itself with the Idaho and Montana supreme courts in reaching that conclusion. *See id.* (explaining that national forestland is "open and unclaimed" land, "consistent with those [holdings] of other jurisdictions").

These decisions leave no doubt that courts in Idaho, Montana, Washington, or indeed anywhere in the Ninth Circuit would reject the proposition that the 1868 Treaty was abrogated because the relevant land was rendered "occupied" by either the Forest Reserve Act or the creation of the Bighorn National Forest. In the Tenth Circuit, however, precisely the opposite is true: President Cleveland's proclamation establishing the Bighorn National Forest rendered the land "occupied" and abrogated the 1868 Treaty. That the two circuits with the vast majority of national forestland disagree on this issue is reason enough to grant certiorari.[9] But when a Wyoming court employs the Tenth Circuit's analysis to permit the criminal conviction of a Native American for engaging in treaty-protected conduct, certiorari is not just warranted but imperative.

III. The Question Presented is Exceptionally Important, And There Are No Vehicle Issues.

Whether the Crow Tribe retains critical rights preserved by the 1868 Treaty is an issue of paramount importance meriting this Court's review. Indeed, the issue is little different from the issue this Court reviewed in *Mille Lacs*, a case addressing whether the Chippewa retained their hunting rights under an 1837 treaty with the United States. *See* 526 U.S. at 185; *see also United States v. Winans*, 198 U.S. 371, 381 (1905)

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[9] There are 188,330,377 acres of national forestland in the country, 162,316,168 of which—86%—are in the states comprising the Ninth and Tenth Circuits. *See* U.S. Forest Serv., Land Areas Report, Tables 1 & 4 (Sept. 30, 2016), http://bit.ly/2xM8W4r.

(describing such rights as "not much less necessary to the existence of the Indians than the atmosphere they breathe[]").[10] The significance of the question in this case is as manifest as it was in *Mille Lacs* or, a century earlier, in *Winans*: Its answer will determine not only whether the Crow Tribe can exercise rights it understandably thought preserved pursuant to binding agreement with the federal government, but also—and on a far more concrete level—whether the Tribe's members can engage in subsistence hunting foundational to their identity and well-being.

Furthermore, a number of other treaties between Indian tribes and the United States preserve Indian rights using language identical or materially identical to that in the 1868 Treaty. *See, e.g.*, Treaty Between the United States & the Navajo Tribe of Indians, art. IX, Aug. 12, 1868, 15 Stat. 667, 670 (preserving "the right to hunt on any unoccupied lands contiguous to their reservation, so long as the large game may range thereon in such numbers as to justify the chase"); Treaty with the Eastern Band Shoshone and Bannock, art. IV, July 3, 1868, 15 Stat. 673, 674-75 (preserving "the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts"); Treaty with the Nez Perces, art. III, June 11, 1855, 12 Stat. 957, 958 (preserving "the privilege of hunting,

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[10] In its petition for certiorari in *Mille Lacs*, the state of Minnesota prominently cited *Repsis* as conflicting with the Eighth Circuit decision this Court ultimately affirmed. *See* Pet. for Writ of Cert. 11-13, 15, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (No. 97-1337).

gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land"); Treaty of Hell Gate (Confederated Salish and Kootenai Tribes), art. III, July 16, 1885, 12 Stat. 975, 976 (preserving "the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land"); Treaty Between the United States and the Dwamish, Suquamish, and Other Allied and Subordinate Tribes of Indians in Washington Territory, art. V, Jan. 22, 1855, 12 Stat. 927, 928 (preserving "the privilege of hunting and gathering roots and berries on open and unclaimed lands"). Accordingly, the issue here affects every other Indian tribe that reserved similar treaty rights.

All that said, the broader implications of this case for the Crow Tribe or Native Americans generally should not obscure the fact that the answer to the question presented will literally affect whether Petitioner will be able to provide for his family. Not only does the decision below forever strip Petitioner of his federally enshrined right to hunt in the Bighorn National Forest, Petitioner's sentence suspends *all* of his hunting privileges in the state of Wyoming for three years. That is no trifling concern. As this very case makes clear, whether Petitioner's family has food on the table during unforgiving Montana winters depends on his ability to exercise the off-reservation hunting rights long ago granted to his tribe. But instead of upholding those rights, the decision below upheld Petitioner's criminal conviction and sentence, all based on reasoning that has been soundly rejected.

The Court should not tolerate that result. And there are no obstacles to the Court's granting certiorari here. The only issue that the court below addressed, and that is before this Court, is the pure "question[] of law" whether the 1868 Treaty has been abrogated, either by Wyoming's admission to the Union or by the establishment of the Bighorn National Forest. App.9. That issue was thoroughly briefed in the proceedings below, and other federal courts of appeals and state supreme courts—to say nothing of this Court in *Mille Lacs*—have thoroughly addressed the effects, if any, of state enabling acts and the creation of national forests on Native American treaty rights. Further percolation, therefore, is unnecessary.

The collateral estoppel issue the court below introduced *sua sponte* also presents no obstacle to the Court's review.[11] As the court acknowledged, federal law governs this issue because the *Repsis* decision exclusively relied upon by the court is a "federal-court judgment" in a "federal-question case[]." *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008); App.12. And under well-established federal law, as this Court has repeatedly held, a prior judgment lacks preclusive effect when there has been an intervening "'change in [the] applicable legal context.'" *Bobby v. Bies*, 556 U.S. 825, 834 (2009) (alteration in original) (quoting Restatement (Second) of Judgments §28 (1980)); *see*

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[11] Although the court below used the term "collateral estoppel," this Court has repeatedly observed that the term "issue preclusion" is preferable. *See Bravo-Fernandez v. United States*, 137 S. Ct. 352, 356 n.1 (2016); *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). This petition nevertheless uses the term "collateral estoppel" to remain consistent with the decision below.

also Limbach v. Hooven & Allison Co., 466 U.S. 353, 362 (1984); *Montana v. United States*, 440 U.S. 147, 161 (1979); *Comm'r of Internal Revenue v. Sunnen*, 333 U.S. 591, 606 (1948).

That principle ends the matter here. There can be no serious dispute that *Mille Lacs* constituted a "change in [the] applicable legal context" that monumentally, if not fatally, undercut the controlling legal principles applied in *Repsis*. As the *Mille Lacs* dissent repeatedly remarked, *see* 526 U.S. at 219 & n.3, 220—without objection by the majority—the Court "effectively overrule[d]" *Race Horse*, the decision that *Repsis* deemed "compelling, well-reasoned, and persuasive" and upon which it principally relied in declaring the Tribe's hunting rights abrogated, 73 F.3d at 994.

Refusing to accept what both the *Mille Lacs* majority and dissent understood, the court below contended that *Mille Lacs* did *not* overrule *Race Horse*. Conceding that *Mille Lacs* "clearly rejected" the "equal footing" doctrine that *Repsis* "largely" relied upon, the court nevertheless believed that *Mille Lacs* only "arguably narrowed the 'temporary and precarious' doctrine." App.24 n.6. That is misguided on many levels. First, *Repsis* itself did not rely on any "temporary and precarious" doctrine to abrogate the 1868 Treaty; it squarely held that the Tribe's hunting rights were "repealed by the act admitting Wyoming into the Union," 73 F.3d at 992—the very proposition that even the court below conceded was overruled by *Mille Lacs*. *See B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1303 (2015) (noting that issue preclusion requires issue to have been

"determined by a valid and final judgment, and the determination is essential to the judgment").[12] Second, to the extent there ever was a "temporary and precarious" doctrine, *Mille Lacs* did not preserve it; the Court deemed it "too broad to be useful." 526 U.S. 207. That is why the dissent accused the majority of overruling the *Race Horse* decision *in toto*, not in part. Third, even if *Mille Lacs* only "narrowed" the "temporary and precarious" doctrine, that still constitutes a "change in [the] applicable legal context" triggering an exception to collateral estoppel. *Bobby*, 556 U.S. at 834.

Regardless, the Court's answer to the question presented will also answer whether there was a change in the "applicable legal context" that defeats collateral estoppel. If the Court were to hold on the merits that *Mille Lacs* fatally undercut *Repsis*, then *Repsis* would no longer have any collateral-estoppel effect.

In the end, not only does collateral estoppel pose no barrier to review; the superbly wrong application of that doctrine below only underscores why this Court

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[12] Because a determination must have been "essential to the judgment," the *Repsis* court's self-styled "alternative basis" for abrogation—the establishment of the Bighorn National Forest—does not collaterally estop further litigation of that issue. *See, e.g.*, *Bobby*, 556 U.S. at 835 ("A determination ranks as necessary or essential only when the final outcome hinges on it."); *Nat'l Satellite Sports, Inc. v. Eliadis, Inc.*, 253 F.3d 900, 910 (6th Cir. 2001) (holding that "where ... one ground for the decision is clearly primary and the other only secondary, the secondary ground is not necessary to the outcome for the purposes of issue preclusion"). Indeed, the court below did not remotely suggest otherwise.

must intervene. It simply cannot be the law that the treaty rights of thousands of Crow Tribe members, now and in the future, are forever held hostage to legal reasoning that would be merely bemusing if their livelihoods were not at stake. And it cannot be the case that an individual can be criminally convicted, fined, and barred from subsistence hunting for his family based on decisions that are contrary to this Court's precedents, out of step with other courts, and fundamentally unjust. At a minimum, if a treaty between Native Americans and the federal government really can be abrogated by a state's admission to the Union or the establishment of a national forest, Petitioner, his Tribe, and all Native Americans deserve to have this Court render that extraordinary judgment. In all events, certiorari is warranted.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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October 5, 2017

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Appendix A

WYOMING SUPREME COURT

No. S-17-0129

CLAYVIN HERRERA,

Petitioner,

v.

THE STATE OF WYOMING, and THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT, SHERIDAN COUNTY,

Respondents.

April Term, A.D. 2017

Filed: June 6, 2017

ORDER DENYING PETITION FOR WRIT OF REVIEW

This matter came before the Court upon "Petitioner Clayvin B. Herrera's Petition for Writ of Review," filed herein May 10, 2017. After a careful review of the petition, the materials attached thereto, the "Response in Opposition to Petition for Writ of Review," the materials attached thereto, the "Reply to State of Wyoming's Response in Opposition to Petition for Writ of Review," and the file, this Court finds that the petition should be denied. It is, therefore,

ORDERED that the Petition for Writ of Review, filed herein May 10, 2017, be, and hereby is, denied; and it is further

ORDERED that the "Motion of Indian Law Professors Debra Donahue, Maylinn Smith, and Monte Mills for Leave to File an *Amicus Curiae* Brief in Support of Clayvin B. Herrera's Petition for Writ of Review," filed herein May 22, 2017, be, and hereby is, denied; and it is further

ORDERED that the "Motion of Crow Tribe of Indians for Leave to File *Amicus Curiae* Brief in Support of Clayvin B. Herrera's Petition for Writ of Review," filed herein May 22, 2017, be, and hereby is, denied.

DATED this 6th day of June, 2017.

BY THE COURT:

/s/

E. JAMES BURKE
Chief Justice

Appendix B

IN THE FOURTH JUDICIAL DISTRICT, SHERIDAN COUNTY, STATE OF WYOMING

No. 2016-242

CLAYVIN HERRERA,

Appellant,

v.

STATE OF WYOMING,

Appellee.

On Appeal from the Fourth Judicial Circuit Court, Sheridan County, Wyoming

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Filed: April 25, 2017

ORDER

John G. Fenn, District Court Judge

The above-entitled matter came before the Court on Appellant, Clayvin Herrera's appeal from the *Order Denying Motion to Dismiss, Striking Evidentiary Hearing and Granting State's Motion in Limine*, entered on October 16, 2015, the *Order After Pretrial Conference*, entered on April 18, 2016, and the *Judgment and Sentence* entered by the Fourth Judicial Circuit Court on April 29, 2016. Having reviewed the record, the briefs of the parties, and

being otherwise fully advised, the Court AFFIRMS the circuit court's orders and the *Judgment and Sentence*.

ISSUES

The Appellant frames the pertinent issues as follows:

1. Did the circuit court err in denying treaty-based immunity to Herrera by holding itself "bound by" an erroneous Tenth Circuit decision, and ruling—in the face of binding U.S. Supreme Court precedent and federal statutory language to the contrary—that the establishment of the BHNF in 1897 by presidential proclamation extinguished the Crow Treaty hunting rights even though Congress has never abrogated those rights?

2. Should the Court grant judgment of acquittal to Herrera, and dismiss the misdemeanor counts against him because the State did not, and cannot meet the controlling federal "conservation necessity" standard for prosecution of an otherwise immune treaty-hunter under state wildlife laws?

The Appellee frames the pertinent issues as follows:

I. Did the trial court err by following *Repsis* and ruling that the Article 4 hunting right was intended to be temporary and no longer exists?

II. Did the trial court err in ruling that the Big Horn National Forest is "occupied land" of the United States?

III. Did the trial court err in ruling that the State's elk seasons were enforceable on Appellant in the Big Horn National Forest because they are

reasonable and necessary for the purposes of conservation?

IV. If the trial court erred, what is the appropriate remedy?

The Court held oral argument in this matter, and it raised an additional question:

I. Do the doctrines of collateral estoppel, issue preclusion, or *res judicata* apply to preclude the Appellant from relitigating the validity of the off-reservation treaty hunting right?

FACTS

Herrera is an enrolled member of the Crow Tribe and a resident of St. Xavier, Montana, which is located on the Crow Reservation. In January 2014, Herrera and several other tribal members decided to hunt for elk on the Crow Reservation. They spotted several elk on the Reservation in the vicinity of Eskimo Creek. At some point, the elk crossed a fence, leaving the Crow Reservation and entering into the Big Horn National Forest in the State of Wyoming. Herrera and the others crossed the fence into Wyoming and continued to track the elk. They shot three bull elk and took the meat back with them to Montana. The elk were taken without a license and during a closed season. Herrera was cited with two misdemeanors, Taking an Antlered Big Game Animal Without a License or During a Closed Season, a violation of W.S. § 23-3-102(d), and Accessory to Taking Antlered Big Game Animal Without a License or During a Closed Season, a violation of W.S. § 23-6-205.

PROCEEDINGS BELOW

On July 2, 2015, Herrera filed a *Motion to Dismiss Under the Supremacy Clause of the United States Constitution and the Fort Laramie Treaty of 1868.* Herrera did not deny taking the elk, but he asserted that he had a right to hunt where and when he did under Article 4 of the Treaty with the Crow, 1868 ("Crow Treaty"). He argued that this treaty gave the Crow Tribe the right to hunt off of the reservation on the "unoccupied lands of the United States" that fell within territory that had been ceded by the Crow, and that this treaty right was still valid and preempted state law. The State filed a *Response* on August 6, 2015, and a *Supplemental Response* with exhibits on August 20, 2015. The State also asked for an evidentiary hearing so the State could offer evidence in support of its position, and it filed a *Motion in Limine re Affidavits* seeking to strike certain affidavits that had been filed with Herrera's motion. On August 20, 2015, the State filed a *Motion in Limine re Treaty Rights*, asking the trial court to prohibit Herrera from making reference to the asserted treaty hunting right at trial, if the circuit court determined that the treaty rights were no longer valid and provided no defense to the State's prosecution.

The circuit court held a status conference on September 1, 2015. It allowed the parties to submit additional briefing and agreed to schedule two evidentiary hearings. The first hearing was set for November 16, 2015, and it was intended to address the meaning of the Crow Treaty and its application to the site where the elk were killed. The second hearing was set for January, and it was set to address whether the

State's elk season regulations were reasonable and necessary for the purposes of conservation and therefore would apply to treaty hunters even if the off-reservation hunting right was still valid. On September 18, 2015, Herrera filed a *Limited Response to the State of Wyoming's Assertion of Conservation Necessity*. The State filed its *Second Supplemental Response* on October 5, 2015. Both parties submitted numerous exhibits in support of their positions.[1] Herrera asserted that no evidentiary hearings were needed, and the court should rule in his favor on all issues as a matter of law.

On October 16, 2015, the circuit court entered its *Order Denying Motion to Dismiss, Striking Evidentiary Hearings and Granting the State's Motion in Limine*. The trial court held that "[t]his issue of off-reservation treaty hunting rights is indistinguishable from the issue and arguments which were adjudicated in *Crow Tribe of Indians vs. Repsis*, 73 F.3d 982 (10th Cir. 1995)." The circuit court found itself to be "bound by the Tenth Circuit's holding that Crow Tribe members do not have off-reservation treaty hunting rights anywhere within the state of Wyoming." The circuit court also rejected Herrera's argument that

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[1] Many of the exhibits submitted by both parties contained inadmissible hearsay. The State objected to the hearsay contained in the affidavits filed by Herrera, but it does not appear that Herrera filed a formal objection to any of the State's exhibits. The circuit court never ruled on the admissibility of any of these exhibits, but it did cite to some of the laws and game codes that had been submitted by the State. Thus, it is unclear which of the exhibits the circuit court relied on when making its decision, or which of these exhibits, if any, were actually admitted into evidence by the court.

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999), had reversed and rejected the *Repsis* case as well as *Ward v. Race Horse*, 163 U.S. 504 (1896), upon which the *Repsis* decision was based. The circuit court agreed with the *Repsis* court's decision that the off-reservation treaty hunting right was intended to be temporary and is no longer valid. The circuit could alternatively held that even if the treaty rights still existed, the regulation at issue met the "conservation necessity" standard, and therefore the regulation would apply to treaty hunters. The circuit court then cancelled the evidentiary hearings that had been set, and trial was scheduled for April 27, 2016.

Herrera filed a *Petition for a Writ of Review, Writ of Certiorari and Writ of Prohibition* with the Wyoming Supreme Court on November 2, 2015. The Wyoming Supreme Court denied the *Petition* on November 23, 2015. Herrera had also filed a *Notice of Appeal* with this Court on November 12, 2015. The State moved to dismiss the appeal for lack of jurisdiction. This Court dismissed the appeal on April 5, 2016, finding that the *Order Denying Motion to Dismiss, Striking Evidentiary Hearings and Granting the State's Motion in Limine* was not a final, appealable order.

Herrera then asked the circuit court to reconsider its position on the State's *Motion in Limine re Treaty Rights.* The circuit court denied this motion in the *Order After Pretrial Conference*, issued on April 18, 2016. The circuit court held that at the time of the alleged violations the controlling law was that members of the Crow Tribe had no off-reservation

treaty hunting rights, and therefore they had no right to hunt in the Big Horn National Forest in violation of Wyoming law. Herrera sought a stay of his trial from both the Wyoming Supreme Court and the Supreme Court of the United States, but neither stay was granted, and his trial commenced on April 27, 2016.

At trial, because a treaty rights defense was not available, Herrera attempted to argue that he was not off of the reservation when he and his companions took the elk. He admitted that he crossed the fence, but claimed that the fence did not mark the true boundary between Wyoming and Montana. The State presented evidence that the spot where the elk were killed is within Sheridan County, Wyoming, and that Herrera knew he was off of the reservation when he killed the elk. The jury convicted Herrera of both counts, and he was given concurrent sentences of one (1) year in jail suspended in lieu of unsupervised probation, three (3) years of suspended hunting privileges, and $8,080.00 in fines and court costs. This appeal followed. Herrera is not challenging anything that occurred at his trial. Rather, he is appealing the circuit court's pretrial decisions on the validity of the off-reservation treaty hunting right.

STANDARD OF REVIEW

This case raises questions of law which are reviewed *de novo,* and the Court affords no deference to the trial court's determinations on the issues. *See, e.g., Bear Cloud v. State,* 2014 WY 113, ¶ 13, 334 P.3d 132, 137 (Wyo. 2014). However, "if the determination of the trial court is correct on any theory it will not be disturbed, or if there exists any legally valid ground appearing in the record, [this Court] must affirm."

Matter of Adoption of RHA, 702 P.2d 1259, 1263 (Wyo. 1985) (citing *Anderson v. Bauer*, 681 P.2d 1316 (Wyo. 1984); *Valentine v. Ormsbee Exploration Corp.*, 665 P.2d 452 (Wyo. 1983); *People v. Fremont Energy Corp.*, 651 P.2d 802 (Wyo. 1982); *ABC Builders, Inc. v. Phillips*, 632 P.2d 925 (Wyo. 1981)).

DISCUSSION

I. Collateral Estoppel, Issue Preclusion, and Res Judicata

The crux of Herrera's argument seems to be that the *Repsis* court incorrectly interpreted the Crow Treaty, and because that interpretation was incorrect, the circuit court should have reinterpreted the treaty under the "proper" federal standards of treaty interpretation. Thus, it appears that Herrera is either directly or indirectly attempting to relitigate the issue that was previously raised and decided in *Repsis*. The Court was concerned that he may be precluded from doing so under the doctrines of collateral estoppel, issue preclusion, or *res judicata*, and it asked the parties to submit additional briefing on this issue.[2] The Court asked the parties to address collateral

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[2] Although the parties did not raise this issue, it is proper for the Court to raise this issue *sua sponte* when no factual development is required, and the parties are given an opportunity to fully brief the issues. *See Hawkins v. Risley*, 984 F.2d 321, 324 (9th Cir. 1993). Allowing the appellate court to raise the issue *sua sponte* is consistent with policies of avoiding unnecessary judicial waste and fostering reliance on judicial decisions by precluding relitigation. *Merrilees v. Treasurer, State of Vt.*, 159 Vt. 623, 623-24, 618 A.2d 1314, 1315-16 (1992) (citing *Dakota Title & EsCrow Co. v. World-Wide Steel Systems, Inc.*, 238 Neb. 519, 525-26, 471 N.W.2d 430, 434-45 (1991); *Wilson v. United States*, 166 F.2d 527,529 (8th Cir. 1948)).

estoppel, issue preclusion, and *res judicata*, because the doctrines are related, and the terms have sometimes been used interchangeably. A good summary of these doctrines is set out in *Goodman v. Voss*, 2011 WY 33, ¶ 23, 248 P.3d 1120, 1126 (Wyo. 2011), where the Wyoming Supreme Court held:

> Collateral estoppel and *res judicata* are analogous, but not synonymous. Although they share a common interest in finality, the doctrines themselves are different. *Tenorio v. State ex rel. Wyoming Workers' Compensation Div.*, 931 P.2d 234, 238 (Wyo. 1997). We recently reiterated their differences:
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> > In *Eklund v. PRI Environmental, Inc.*, 2001 WY 55, ¶ 15-20, 25 P.3d 511, [517-18] (Wyo. 2001), we extensively recognized that *res judicata* and collateral estoppel are related but distinct concepts.
> >
> > *Res judicata* bars the relitigation of previously litigated claims or causes of action. *Slavens v. Board of County Commissioners*, 854 P.2d 683, 686 (Wyo. 1993). Four factors are examined to determine whether the doctrine of *res judicata* applies: (1) identity in parties; (2) identity in subject matter; (3) the issues are the same and relate to the subject matter; and (4) the capacities of the persons are identical in reference to both the subject matter and the issues between them. *Id.* Collateral estoppel

> bars relitigation of previously litigated issues and involves an analysis of four similar factors: (1) whether the issue decided in the prior adjudication was identical with the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Id.*
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> *Polo Ranch Co. v. City of Cheyenne*, 2003 WY 15, ¶ 12, 61 P.3d 1255, [1259] (Wyo. 2003).
>
> Collateral estoppel is issue preclusion, while *res judicata* is claim preclusion. *Eklund v. PRI Environmental, Inc.*, 2001 WY 55, ¶ 15, 25 P.3d 511, [517] (Wyo. 2001).

Although this case involves the application of federal law, federal courts apply the same four prerequisites for collateral estoppel as Wyoming courts do. *See, e.g., Murdock v. Ute Indian Tribe of Uintah and Ouray Reservation*, 975 F.2d 683, 687 (10th Cir. 1992). Therefore, collateral estoppel/issue preclusion is the appropriate doctrine to analyze. Herrera argues that the doctrine does not apply to him for the following reasons: 1) *Repsis* was overruled by *Mille Lacs*, and this change in the law prevents preclusion; 2) a change in the applicable facts prevents preclusion; 3) Herrera

was not a party or in privity with a party in the *Repsis* case; and 3) the issues in the two cases are not identical. The State asserts that collateral estoppel does bar Herrera's treaty rights defense, and its use here is justified by the facts and the nature of the treaty right at issue. The Court must therefore determine whether the factors of collateral estoppel/issue preclusion are present in this case, such that Herrera would be precluded from relitigating the validity of the off-reservation treaty hunting right.

(a) Whether the issue decided in the prior adjudication was identical with the issue presented in the present action

The State asserts that the primary issue in this case is identical to the primary issue in the *Repsis* case: the continued validity of the off-reservation treaty hunting right. Herrera argues that the issues in the *Repsis* case were not identical to the issues in this case. He admits that *Repsis* involved a ruling on the continued validity of the treaty-hunting right in the Crow Treaty. However, he argues that the issues are not identical, because "*Repsis* did not address the issue raised in this matter of the treaty-hunting right as retained and kept in force by two subsequently Congressionally (sic) ratified agreements." However, these "subsequently" ratified agreements were signed in 1891 and 1904. Hence, their existence was known when the *Repsis* case was decided. The fact that Hererra may be making a different argument for the enforceability of the treaty hunting right does not change the fact that the ultimate issue in the two

cases is identical.[3] The primary issue that Herrera is attempting to litigate is indistinguishable from the issue that was previously litigated in *Repsis*. The Court finds that the first prerequisite for the application of collateral estoppel has been met.

(b) Whether the prior adjudication resulted in a judgment on the merits

"Adjudication on the merits requires that the adjudication be necessary to the judgment." *Murdock*, 975 F.2d at 687 (citing *Block v. Comm'rs*, 99 U.S. 686, 693 (1878)). "[A] judgment of a court of competent jurisdiction is [as between the parties or their privies] everywhere conclusive evidence of every fact upon which *it must necessarily have been founded*." *Id.* (emphasis in original). In *Repsis*, the Crow Tribe sought a declaratory judgment asking the court to determine the validity of the off-reservation treaty hunting right. The federal district court for the State of Wyoming found that the right was intended to be temporary in nature, and it was no longer valid. Thus, the validity of the off-reservation treaty hunting right was necessary to that judgment. Thus, the Court finds that this prerequisite has also been met.

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[3] Herrera also argues that the issues in this case are not identical to those in *Repsis*, because the conservation necessity issue involved a different State regulation. However, the circuit court's ruling on the conservation necessity issue was an alternative holding in the event that the treaty rights do still exist. If the treaty rights do not exist, then it is immaterial whether the State's regulation met the conservation necessity standard. Therefore, the Court's ruling the treaty hunting right issue makes it unnecessary to address the conservation necessity issue.

(c) Whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication

Although Herrera was not a party to the *Repsis* case, the Crow Tribe was a party. Thus, the Court must decide if Herrera is in privity with the Crow Tribe.[4] The Supreme Court has long recognized that "'in certain limited circumstances,' a nonparty may be bound by a judgment because she was 'adequately represented by someone with the same interests who [wa]s a party' to the suit." *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008) (quoting *Richards v. Jefferson Cnty.*, 517 US 793, 798 (1996)) (alterations in original). Although privity does not have a set definition in federal law, the Ninth Circuit has set forth a three-factor test for determining whether an absent party's interests are being adequately represented:

> Consequently, we will consider three factors in determining whether existing parties adequately represent the interests of the absent tribes: whether the interests of a present party to the suit are such that it will undoubtedly make all of the absent party's arguments; whether the party is capable of

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[4] More recent cases have moved away from using the term "privies," and it was abandoned in the Second Edition of the Restatement. However, these cases still focus on whether the person bringing the second suit had a direct financial or proprietary interest in the previous suit and are now "seeking to redetermine issues previously resolved." *See, e.g., Montana v. United States*, 440 U.S. 147, 154 (1979). In this case, both the Crow Tribe and Herrera had a direct interest in having the treaty rights declared to be valid in the *Repsis* case, and they are now seeking to have this issue redetermined in this case.

> and willing to make such arguments; and whether the absent party would offer any necessary element to the proceedings.

U.S. ex rel. Yankton Sioux Tribe v. Gambler's Supply, Inc., 925 F. Supp. 658, 666 (D.S.D. 1996) (citing *Shermoen v. U.S.*, 982 F.2d 1312, 1318 (9th Cir. 1992) (citations omitted); *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1498 (9th Cir. 1995)).[5]

In this case, the three factor test set out by the Ninth Circuit is clearly satisfied. The Treaty was made with the Crow Tribe, and they had an equal, if not greater, interest than Herrera in having the off-reservation treaty hunting rights declared valid. The Tribe was represented by competent legal counsel, who was willing and capable of making arguments in favor of the Treaty's validity. The Tribe wanted the right to be declared valid for all of its members, and Herrera's presence in the *Repsis* case would not have offered any element necessary to the proceeding.

Further, federal courts have recognized that treaty hunting and fishing rights inure to the benefit of the Tribe as a whole:

> Each tribe bargained as an entity for rights which were to be enjoyed communally . . . . Individual Indians had no individual title to property, but participated in the communal rights of the tribe. "The

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[5] In *Gambler's Supply*, the South Dakota federal district court found that *res judicata* precluded the Yankton Sioux Tribe from bringing a *qui tam* action against a casino management company, because a tribal member had previously brought her own *qui tam* action against the company. The court found that the tribe and its member were in privity with each other. 925 F. Supp. at 670.

> right of the individual Indian is, in effect, a right of participation similar in some respects to the right of a stockholder in the property of the corporation . . . . The right to fish was one such community property right pertaining to the tribe."

United States v. Washington, 520 F.2d 676, 688 (9th Cir. 1975) (quoting F. Cohen, *Handbook of Federal Indian Law* (1942)). Herrera only has an off-reservation treaty hunting right if the Crow Tribe has such a right. If the Tribe no longer has these rights, its members do not have them either. In *Repsis*, the Tribe's interests were aligned with Herrera's, and the Tribe understood itself to be acting in a representative capacity for its members. *See Taylor*, 553 U.S. at 900 (holding that the representation of a nonparty is adequate when the interests of the nonparty and her representative are aligned, and the party understood herself to be acting in a representative capacity). Therefore, the Court finds that Herrera is in privity with the Crow Tribe, and the third prerequisite is also satisfied.

(d) Whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding

The full and fair inquiry often focuses on whether there were significant procedural limitations in the prior proceeding, whether the party to the prior action had the incentive to litigate the issue fully, and whether effective litigation was limited by the nature or relationship of the parties. *Murdoch*, 975 F.2d at 689 (citing *Si-Flo, Inc. v. SFHC, Inc.*, 917 F.2d 1507,

1521 (10th Cir. 1990)). The *Repsis* case was resolved through summary judgment. Federal case law makes clear that "a plaintiff has a full and fair opportunity to litigate if it is allowed to submit evidence to defeat a motion for summary judgment. *Matosantos Commercial Corp. v. Applebee's Int'l, Inc.*, 245 F.3d 1203, 1211 (10th Cir. 2001) (citing *Exhibitors Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 421 F.2d 1313, 1319 (5th Cir.1970) ("It would be strange indeed if a summary judgment could not have collateral estoppel effect."); 18 Charles Alan Wright, *Federal Practice and Procedure* § 4419 (1981) ("It is clear enough that issue preclusion generally is appropriate if some effort is made to litigate the issue, but the evidence introduced is held insufficient to can-y the burden of persuasion or even the burden of production.")). A full and fair opportunity to litigate an issue also includes some opportunity to appeal an adverse decision. *Bell v. Dillard Dept. Stores, Inc.*, 85 F.3d 1451, 1456 (10th Cir. 1996). After consideration of these factors, the Court concludes that the Crow Tribe, which is in privity with Herrera, had a full and fair opportunity to litigate the issue in *Repsis*. The Tribe had an opportunity to present evidence to defeat the summary judgment motion, and it did appeal the federal district court's decision. When the district court's decision was affirmed by the Tenth Circuit, the Tribe sought a writ of certiorari to the Supreme Court of the United States, which was ultimately denied. The Court also finds that the Tribe had an incentive to litigate the issue fully, and effective litigation was not limited by the nature or relationship of the parties. Thus, the Court finds that the fourth prerequisite is also satisfied.

II. Exceptions to the Doctrine

Collateral estoppel is largely a "judge-made" doctrine and several exceptions have been found to exist. *Heck v. Humphrey*, 512 U.S. 477, 488 n. 9 (1994) (citing Hart and Wechsler's *The Federal Courts and the Federal System* 1598 (3d ed. 1988)). These exceptions are set out in Restatement (Second) of Judgments § 28 (1982), which reads:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
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> > (1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or
> >
> > (2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or
> >
> > (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or

> (4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or
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> (5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

Herrera argues that the *Mille Lacs* case constitutes an intervening change in the applicable legal context since *Repsis* was decided, such that a new determination is necessary. The State contends that *Mille Lacs* did not overrule *Repsis*, so there has been

no change in the law, and this exception does not apply in this case.

The *Repsis* decision was largely based on the holding of *Ward v. Race Horse*, 163 U.S. 504 (1896). In *Race Horse*, the Supreme Court of the United States was tasked with determining whether the treaty made by the United States with the Bannock Indians gave them the right to exercise an off-reservation hunting privilege within the limits of the state of Wyoming in violation of its laws. *Id.* at 507. A member of the Bannock Tribe had been arrested on charges of killing seven elk in violation of Wyoming's game laws. The Supreme Court looked at the language of the treaty, which read:

> But they shall have the right to hunt on the unoccupied lands of the United States, so long as game may be found thereon, and so long as peace subsists among the white and Indians on the borders of the hunting districts.

The Supreme Court found that the treaty hunting right given by the treaty was "temporary and precarious" in nature. *Id.* at 510. The right was "essentially perishable, and intended to be of a limited duration." *Id.* at 515. The Supreme Court also found that the act that admitted Wyoming to the Union was inconsistent with the rights granted in the treaty, and if it remained, Wyoming would not have been admitted as an "equal member" of the Union. *Id.* at 514. This so called "equal footing" doctrine has subsequently been rejected by numerous cases. However, the "temporary and precarious" doctrine remained alive and well.

In *Repsis,* the Tenth Circuit Court of Appeals found that the off-reservation hunting right found in Article 4 of the Crow Treaty was also "temporary and precarious." 73 F.3d at 988. It made this conclusion in part on the fact that the language in the two treaties is identical. *Id.* at 987. The *Repsis* court concluded that "[t]he Tribe's right to hunt reserved in the Treaty with the Crows, 1868, was repealed by the act admitting Wyoming into the Union." *Id.* at 992 (citing *Race Horse,* 163 U.S. at 514). The *Repsis* court also pronounced an alternative reason for affirming the district court's ruling; the creation of the Big Horn National Forest resulted in the "occupation" of the land, extinguishing the off-reservation hunting right. *Id.* at 993. As a third reason for affirmance, the court also concluded that "there was ample evidence in the record to support a finding that the regulations at issue were reasonable and necessary for conservation." *Id.*

In *Mille Lacs,* the Mille Lacs Band of Chippewa Indians had filed a declaratory judgment action seeking a determination that their treaty rights were still in effect. An 1837 treaty had given the Tribe the right to hunt, fish, and gather wild rice on territory ceded to the United States during the pleasure of the president. 526 U.S. at 177. In 1850, President Zachary Taylor issued an executive order stating that the privileges granted to the Chippewa Indians were revoked. *Id.* at 179. However, as of 1855 the federal officials in Minnesota were still recognizing the Chippewa's rights to hunt and fish. *Id.* at 182. Another treaty was signed in 1855, but it did not explicitly mention whether the hunting and fishing rights were still in effect. *Id.* at 184. Minnesota was admitted to

the Union three years later, and the admission act was also silent with respect to Indian Treaty Rights. *Id.* at 185. The Tribe filed suit in 1990 to clarify their rights under the various treaties. The Supreme Court of the United States again rejected the equal footing doctrine of *Race Horse*. However it acknowledged that the *Race Horse* court had "also announced an alternative holding: The treaty rights at issue were not intended to survive Wyoming's statehood." *Id.* at 206. The Court then went on to say that "[t]he 'temporary and precarious' language in *Race Horse* is too broad to be useful in distinguishing rights that survive statehood from those that do not." *Id.* However, the Supreme Court did not completely reject the temporary and precarious doctrine. Rather it stated that "[t]he focus of the *Race Horse* inquiry is whether Congress . . . intended the rights secured by the 183 7 Treaty to survive statehood." *Id.* at 207. It then concluded that unlike the treaty in *Race Horse*, "there [was] no fixed termination point to the 1837 Treaty Rights." The Supreme Court went on to say:

> The Treaty in *Race Horse* contemplated that the rights would continue only so long as the hunting grounds remained unoccupied and owned by the United States; the happening of these conditions was "clearly contemplated" when the Treaty was ratified. By contrast the 1837 Treaty does not tie the duration of the rights to the occurrence of some clearly contemplated event.

Id. at 207. While the *Mille Lacs* court stated that *Race Horse* did not compel the conclusion that Minnesota's admission to the Union extinguished Chippewa

usufructuary rights, it affirmed the concept that certain treaties, like the one in *Race Horse* were intended to terminate upon the happening of a "clearly contemplated" event. Thus, contrary to Herrera's contention, *Mille Lacs* did not overturn *Race Horse* or *Repsis*.[6] Rather, it affirmed the concept that a court interpreting a treaty must determine if the rights reserved in the treaty were intended to be perpetual or if they were intended to expire upon the happening of a "clearly contemplated event." *Mille Lacs* did not change the fundamental legal principles applicable to the interpretation of treaties. When the legal framework is unchanged, "normal rules of preclusion should operate to relieve the parties from redundant litigation . . . ." *Montana v. United States*, 440 U.S. 147, 162 (1979).

In addition, although preclusion does not generally attach to pure questions of law, it does generally apply to determinations that mingle facts with conclusions of law. 18 Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc. Juris.* § 4425 (3d ed. 2017). Preclusion generally is appropriate if both the first and second action involve application of the

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[6] The Court notes that Chief Justice Rehnquist opined in his dissent that *Mille Lacs* "effectively overrules *Race Horse sub silientio*." 526 U.S. at 219 (Rehnquist, C.J., dissenting). However, this Court has careful reviewed the majority opinion, and cannot agree with this assertion. The *Mille Lacs* Court clearly rejected the equal footing doctrine of *Race Horse*, and while it arguably narrowed the "temporary and precarious" doctrine, it did not overrule it. Instead, the *Mille Lacs* Court held that courts should look to see whether the rights granted in a treaty were intended to terminate upon the happening of a clearly contemplated event, as the *Race Horse* Court had done.

same principles of law to a historic fact setting that was complete by the time of the first adjudication. *Id.* The determination of the validity of the off-reservation treaty right is a mixed question of law and fact, and it involves the application of the same principles of law to historic facts that were complete by the time of the first adjudication.[7] The Supreme Court of the United States has held that although *res judicata* and estoppel do not apply to pure questions of law, the doctrines do apply when a fact, question, or right has been adjudicated in a previous action, even if that determination was based on an erroneous application of the law:

> The contention of the government seems to be that the doctrine of *res judicata* does not apply to questions of law; and, in a sense, that is true. It does not apply to unmixed questions of law. Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely

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[7] Herrera also argues that the total population of elk has changed since *Repsis*. If the *Reps is* case had decided that the Treaty rights were no longer valid because game could no longer be found in the area ceded by the Crow Tribe, the change in the elk population might be relevant to the issue of preclusion. However, this was not the basis for *Repsis's* holding. In addition, the total population of elk would be relevant for determining whether the regulation met the conservation necessity. However, this inquiry is only necessary if the Court found that the treaty hunting rights were valid. Because the Court concludes that the treaty rights are not valid, it does not need to reach the conservation necessity issue.

> because the parties are the same in both cases. But a *fact, question* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law. That would be to affirm the principle in respect of the thing adjudged but, at the same time, deny it all efficacy by sustaining a challenge to the grounds upon which the judgment was based. *See Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 291, 26 S. Ct. 252, 50 L. Ed. 447; *United States v. California & Ore Land Co.*, 192 U. S. 355, 358, 24 S. Ct. 266, 48 L. Ed. 476; *Scotland County v. Hill*, 112 U.S. 183, 187, 5 S. Ct. 93, 28 L. Ed. 692; *Southern Minnesota Ry. Ext. Co. v. St. Paul & S. C. R. Co.*, 55 F. 690, 695, 696, 5 C. C. A. 249; *Pittsford v. Chittenden*, 58 Vt. 49, 57, 3 A. 323; Bigelow on Estoppel (6th Ed.) p. 112.

United States v. Moser, 266 U.S. 236, 242 (1924) (emphasis added). Therefore, because the Crow Tribe's rights under the Crow Treaty were previously adjudicated in *Repsis*, that right cannot be disputed in the present action, even if the determination was reached through an erroneous application of the law.

III. Offensive Issue Preclusion in a Criminal Case

The Court recognizes that collateral estoppel/issue preclusion is most often applied in civil cases, and that its use in criminal cases is rare. Federal courts have stated that "while 'wise public policy and judicial efficiency' may be sufficient reasons

to apply collateral estoppel in civil cases, they do not have the same weight and value in criminal cases." *United States v. Gallardo-Mendez*, 150 F.3d 1240, 1244 (10th Cir. 1998). The Wyoming Supreme Court has yet to tackle this issue, but is has held that collateral estoppel can apply in a civil action to an issue that was litigated in a criminal action. *See Bowen v. State, Dep't of Transp.*, 2011 WY 1, ¶ 11-12, 245 P.3d 827, 830-31 (Wyo. 2011) (holding that collateral estoppel precluded the appellant in an administrative action from relitigating the question of whether his breath tests results were legally obtained when that issue had previously been adjudicated in a criminal case). Some federal courts have also allowed the government to use a judgment in a criminal case following a guilty plea to collaterally estop a defendant from relitigating an issue in a subsequent criminal case, while others have held that doing so violates due process. *Compare United States v. Gallardo-Mendez*, 150 F.3d at 1244, *with Hernandez-Uribe v. United States*, 515 F.2d 20, 21-22 (8th Cir. 1975), *and United States v. Bejar-Matrecios*, 618 F.2d 81, 83-84 (9th Cir. 1980).

It appears that the applicability of collateral estoppel in criminal cases turns on whether the doctrine would preclude the defendant from challenging a substantive element of the charged offense. Some courts are allowing the use of collateral estoppel when it "affects a judge's pretrial ruling and does not necessarily eliminate a jury's consideration of substantive elements of the indicted offense." *State v. Hewins*, 409 S.C. 93, 111, 760 S.E.2d 814, 823 (2014). Accordingly, some courts have declined to adopt a blanket prohibition of the offensive use of collateral

estoppel in this context, provided that the requirements of collateral estoppel are met. *Id.* (citing 6 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 11.2(g) (5th ed. Supp. 2013); Anne Bowen Poulin, *Prosecution Use of Estoppel and Related Doctrines in Criminal Cases: Promoting Consistency, Tolerating Inconsistency*, 64 Rutgers L. Rev. 409, 432-40 (Winter 2012)).

Further, at least one state court has allowed collateral estoppel to be used in a criminal case when the issue was previously adjudicated in a civil case. In *Moses v. Department of Corrections*, the Michigan Court of Appeals upheld the use of collateral estoppel to preclude a defendant from challenging the court's jurisdiction to prosecute him for a crime he asserted had been committed in "Indian Country." 274 Mich. App. 481, 503-04, 736 N.W.2d 269, 282-83 (2007). A previous decision had held that the "swampland" where the crime had been committed was not part of the Reservation, but was actually part of the State of Michigan. The court held that this decision precluded the defendant from challenging the court's jurisdiction in his criminal case:

> Second, the prosecutor correctly points out that in *Oglala Sioux Tribe v. Homestake Mining Co.*, 722 F.2d 1407, 1413-1414 (C.A.8, 1983), the Eighth Circuit Court of Appeals found that a commission decision, under the doctrine of collateral estoppel, precluded a tribe from litigating title in an action against a private party. Notwithstanding the prosecutor's cursory treatment of this issue, we conclude that there is merit in the

prosecutor's position that the doctrine of collateral estoppel applies. Collateral estoppel is a rule of issue preclusion. It bars the "relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding." *Leahy v. Orion Twp.*, 269 Mich. App. 527, 530, 711 N.W.2d 438 (2006). But the absence of mutuality does not always preclude application of collateral estoppel. *Monat v. State Farm Ins. Co.*, 469 Mich. 679, 688, 677 N.W.2d 843 (2004). In *Monat, supra* at 695, 677 N.W.2d 843, our Supreme Court held that, where collateral estoppel is asserted against a party who already had a full and fair opportunity to litigate the issue, mutuality is not required. Although plaintiff was not a party to the matter before the Indian Claims Commission, he claims rights as a member of the Indian tribe that was a party. "To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert." *Adair v. Michigan*, 470 Mich. 105, 122, 680 N.W.2d 386 (2004). Because plaintiff is claiming rights as a member of the Saginaw Chippewa Indian Tribe, we find that the requisite privity exists to apply the doctrine of collateral estoppel in this case.

The fact that the instant case is a criminal case should not preclude application of the doctrine. Collateral estoppel cannot be invoked to preclude a defendant from contesting an essential element of a criminal charge. *People v. Goss (After Remand)*, 446 Mich. 587, 600, 521 N.W.2d 312 (Levin, J.), 610-611 (Brickley, J.); 446 Mich. 587, 521 N.W.2d 312 (1994). But because the instant issue involves only a jurisdictional challenge to the Isabella County Prosecutor's authority to prosecute plaintiff in the criminal case, we conclude that it is permissible under *Monat*, *supra* at 695, 677 N.W.2d 843, for the prosecutor to make defensive use of collateral estoppel to preclude relitigation of an issue previously litigated by plaintiffs Indian tribe regarding whether the swampland was part of the reservation. The doctrine, as applied, promotes the efficient administration of justice and ensures more consistent judicial decisions. *Id.* It also furthers the purpose of the Indian Claims Commission Act by according finality to the Indian Claims Commission's determinations regarding Indian claims. *Dann*, *supra* at 45, 105 S. Ct. 1058. Applying the rule of law established in *Bennett* to the commission's finding, it follows that the swampland granted to the state of Michigan is not "Indian country" as a matter of law because it is not "within the limits of any Indian reservation under the jurisdiction of the United States Government," as required by 18 U.S.C. 1151.

Moses v. Dep't of Corr., 274 Mich. App. at 503-04, 736 N.W.2d at 282-83.

In this case, the use of collateral estoppel would not preclude Herrera from contesting an essential element of the criminal charge. Herrera was claiming a treaty based immunity from prosecution. This issue was civil in nature, and it did not present questions of fact for a criminal jury to weigh in deciding his guilt or innocence. Applying collateral estoppel would not eliminate the jury's consideration of the substantive elements of the offense. The State still had to prove all of the elements of the charged crimes beyond a reasonable doubt. Thus, the Court finds that the application of collateral estoppel in this case does not violate Herrera's right to due process. Therefore, the Court concludes that collateral estoppel should apply to preclude Herrera from attempting to relitigate the validity of the off-reservation treaty hunting right that was previously held to be invalid in the *Repsis* case. Although the circuit court did not base its holding on collateral estoppel, it is a legal ground appearing in the record, and this Court can affirm the circuit court's decision on this basis.

IV. Alternative Reason for Affirmance

Even if collateral estoppel did not apply in this case, there are other grounds appearing in the record that support affirming the circuit court's decision. Under the Supremacy Clause, treaties are binding on the states until Congress limits or abrogates the treaties. *See, e.g., Antoine v. Washington*, 420 U.S. 194, 201-02 (1975). Treaties are contracts, and principles of contract law apply when a court is tasked with interpreting a treaty. As with all contracts, the

interpretation begins with the text of the treaty. *Air France v. Saks*, 470 U.S. 392, 396-97 (1985). The goal is to determine the intent of the parties. *Washington v. Washington State Commercial Passenger Fishing Vessel*, 443 U.S. 658, 675 (1979). However, unlike most contracts where parol evidence is not considered, "the history of the treaty, the negotiations, and the practical construction adopted by the parties should also be considered. *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943). There should be a fair appraisal of the purpose of the treaty negotiations, the language of the treaties, and this Court's prior construction of the treaties." *Fishing Vessel*, 443 U.S. at 675. *Race Horse* applied these cannons of construction when interpreting the Bannock Treaty. 163 U.S. at 508. The Court opined:

> Doubtless the rule that treaties should be so construed as to uphold the sanctity of the public faith ought not to be departed from. But that salutary rule should not be made an instrument for violating the public faith by distorting the words of a treaty, in order to imply that it conveyed rights wholly inconsistent with the language and in conflict with an act of Congress, and also destructive of the rights of one of the States.

Id. at 516. After considering the language of the treaty, the *Race Horse* court concluded that the rights granted in the treaty were temporary in nature, and they were not intended to survive Wyoming statehood. *Id.* at 515. Similarly, the *Repsis* court discussed these cannons of construction when interpreting the Crow Treaty. 73 F.3d at 992. After considering the language

of the Crow Treaty, the *Repsis* court found that "[t]he Tribe's right to hunt reserved in the Treaty with the Crows, 1868, was repealed by the act admitting Wyoming into the Union. Therefore the tribe and its members are subject to Wyoming's game laws and regulations regardless of whether the regulations are reasonable and necessary for conservation." *Id.* at 992-93. The *Repsis* court also alternatively held that the treaty rights were no longer valid, because "the creation of the Big Horn National Forest resulted in the 'occupation' of the land." *Id.* at 993.

The circuit court found itself to be "bound" by the decision in the *Repsis* case. The State concedes that while the Supreme Court of the United State's interpretation of federal law is binding on state courts, neither the Supremacy Clause nor any other principle of federal law requires that a state court's interpretation of federal law give way to a lower federal court's interpretation. *See Lockhart v. Fretwell*, 506 US 364, 376 (1993) (Thomas, J. concurring). Therefore, *Repsis* was not binding authority. However, where no decision on a particular issue has been rendered by the Supreme Court of the United States, state courts "are free to adopt decisions of the lower federal courts if [they] find their analysis and conclusions persuasive and appropriate for [their] jurisprudence." *Abela v. Gen. Motors Corp.*, 469 Mich. 603, 606-607, 677 N.W.2d 325 (2004); *see also Evan v. Thomson*, 518 F.3d 1, 8 (1st Cir. 2008). Although there was binding authority on the invalidity of the Bannock Treaty, other than through collateral estoppel as discussed above, there was no binding decision on the validity Crow Treaty. However, the circuit court was presented with the *Repsis* case, which had squarely

addressed the interpretation of the Crow Treaty. The circuit court was free to adopt that decision if it found it to be persuasive and appropriate. The circuit court did adopt the analysis and conclusions of the *Repsis* case, and this Court finds that it was appropriate to do so.

Herrera's primary argument is that the circuit court should not have found *Repsis* to be persuasive, because it was overruled by *Mille Lacs*. The circuit court rejected this argument, and as discussed above, this Court also concludes that *Mille Lacs* did not overrule *Repsis*. Rather, *Mille Lacs* reaffirmed the principle that the court must look at the language in the treaty to determine whether it was intended to be perpetual or if it was intended to terminate at the occurrence of a "clearly contemplated" event. The *Repsis* court applied this principle and determined that the off-reservation treaty hunting right in the Crow Treaty was no longer valid. It was therefore proper for the circuit court to adopt the reasoning in the *Repsis* decision, and bar Herrera from asserting the invalidated treaty hunting right as a defense to the criminal prosecution.

NOW, THEREFORE, IT IS HEREBY ORDERED that the circuit court's orders and the *Judgment and Sentence* are AFFIRMED.

Dated this [handwritten: 25] day of [handwritten: April], 2017.

Certificate of Clerk of the District Court. The above is a true and correct copy of the original instrument

[handwritten: signature]
John G. Fenn
District Court Judge

which is on file or of record in this court.

Done this [handwritten: 25] day of [handwritten: April] 20[handwritten: 17] [handwritten: signature] Clerk

By ____ Deputy

Copies to:
Christopher LaRosa
Kyle Gray
Andrew A. Irvine
Andrew A. Irvine
Dennis M. Bear
Don't Walk

Appendix C

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL DISTRICT, SHERIDAN COUNTY, WYOMING

Nos. CT-2015-2687, CT-2015-2688

STATE OF WYOMING,

Plaintiff,

v.

CLAYVIN HERRERA,

Defendant.

On Appeal from the Fourth Judicial Circuit Court, Sheridan County, Wyoming

Filed: October 16, 2015

ORDER DENYING MOTION TO DISMISS, STRIKING EVIDENTIARY HEARING AND GRANTING THE STATE'S MOTION IN LIMINE

The defendant was cited in CT-2014-2687 for *Taking Antlered Big Game Animal Without A License or During a Closed Season* a violation of W.S. §23-3-102(d) and in CT-2015-2688 with *Accessory to Taking Antlered Big Game Animal Without A License or During a Closed Season* a violation of W.S. §23-6-205. Defendant pled not guilty and has moved for the dismissal of these citations under the Supremacy

Clause of the United States Constitution. The Court having reviewed federal and state law and multiple briefs and arguments submitted by both the defendant and the state finds, concludes and orders as follows:

Defendant asserts that he is a member of the Crow Tribe of Indians and pursuant to Article 4 of the Treaty with the Crows, 1868, has an off-reservation treaty hunting right to hunt in the Big Horn National Forest (BHNF.) He argues that because of the 1868 Treaty he has an unlimited, unregulated and unrestricted right to hunt in the BHNF. From the documents filed of record and the statements of counsel both the state and Defendant would require this Court to make a reinterpretation of the 1868 Treaty. The defendant has submitted multiple exhibits, affidavits and legal argument insisting that the 1868 Treaty was not interpreted or the interpretation is invalid. The state argues that the 1868 Treaty has been interpreted and that such interpretation is the precedence for this Court, but then demanded an evidentiary hearing on the issues. The decision on the matter of off-reservation treaty hunting rights is based in law and not in fact. No evidentiary hearing is warranted as the 1868 Treaty has been interpreted and that interpretation is the precedent followed by this Court in finding that the defendant does not have an off-reservation treaty hunting right.

This issue of off-reservation treaty hunting right is indistinguishable from the issue and arguments which were adjudicated in *Crow Tribe of Indians vs Respis*, 73 F.3d 982 (10th Cir. 1995). In that matter Thomas L. Ten Bear, a Crow Tribal member and

resident of Montana was cited on November 14, 1989, for a violation of W.S. §23-3-102(a) Taking an Elk without a Wyoming Hunting License. Mr. Ten Bear moved to dismiss the citation by arguing that he had an unrestricted right to hunt in the BHNF because that was "unoccupied" lands of the United States under Article 4 of the Treaty with the Crows, 1868. *Repsis* at 985. The motion to dismiss was denied. See State's Exhibit 31, ("Memorandum Decision & Order On Motion to Dismiss," *State v Ten Bear*, CT 8911-0239 July 17, 1990).[1] The issue ultimately was heard by the Tenth Circuit Court of Appeals and is precedent for this Court.

Not only does this Court agree, but also is bound by the Tenth Circuit's holding that Crow Tribe members do not have off-reservation treaty hunting rights anywhere within the state of Wyoming. That court found that the language in Article 4 of the 1868 Treaty was the same language that had previously been interpreted in *Ward vs. Race Horse,* 163 U.S. at 514, 16 S.Ct. 1076, 41 L.Ed. 244 (1896).[2] *Repsis* at 986-987. The *Race Horse* Court concluded that the hunting right reserved by the treaty was "perishable and intended to be of limited duration." *Id.* at 517. The *Repsis* Court agreed that the treaty language was temporary and that BHNF was "occupied land" which terminated the off-reservation treaty hunting right.

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[1] In The County Court of Sheridan County, Sheridan, Wyoming.

[2] Mr. Race Horse in 1895 was accused of killing seven elk on unoccupied public land of the United States in Uinta County in violation of state law. Mr. Race Horse argued that he had a right to hunt on those lands under the Treaty of February 24, 1869.

Repsis.[3] The Crow Tribe's right to hunt reserved in the 1868 Treaty with the Crows was temporary and is no longer a valid right.

The Defendant argues that *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999) rejected and reversed the *Race Horse* decision. The defendant mischaracterizes what the *Mille Lacs* decision repudiated in *Race Horse*. The U.S. Supreme Court rejected the *Race Horse* "equal footing doctrine," that statehood alone would not terminate the off-reservation Treaty hunting rights. *Mille Lacs at 203-204*. That ruling had no effect on the *Repsis* decision and in fact the *Mill Lacs* Court further stated: "But this Court's cases have also recognized that Indian treaty-based usufructuary rights do not guarantee the Indians 'absolute freedom' from state regulation. *Oregon Dept. of Fish and Wildlife v. Klamath Tribe*, 473 U.S., at 765, n. 16, 105 S.Ct. 3420.." *Mill Lacs* at 204-205. Defendant does not have off-reservation treaty hunting rights and is subject to regulation by the state.

Moreover, if the Defendant had the off-reservation right to hunt, the state of Wyoming may regulate that right in the interest of conservation. The "conservation necessity" allows state imposed limitations on an Indian treaty rights. *See, e.g., Mille Lacs*, citing *Puyallup Tribe v. Department of Game of Wash.*, 391 U.S. 392, 398 (1968); *Washington v. Washington State Commercial Passenger Fishing*

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[3] The U.S. Supreme Court denied certiorari in *Crow Tribe of Indians vs Respis, cert. denied*, 517 U.S.1221, 116 S. Ct. 1851, 134 L.Ed.2d 951 (1996).

Vessel Assn., 443 U.S. 658, 682 (1979); *Antoine v. Washington*, 420 U.S. at 207-208 (1975). In fact, Senior Circuit Judge Barrett in the *Repsis* decision wrote: "On appeal, the Tribe recognizes its treaty hunting and fishing rights are subject to state regulation 'in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.' *Puyallup Tribe v. Department of Game of Wash.*, 391 U.S. 392, 398, 88 S.Ct. 1725, 1728, 20 L.Ed.2d 689 (1968) (*Puyallup I*)." *Repsis* at 988. The defendant's arguments that closing the elk hunting season in January discriminates against the off-reservation treaty hunter fails in the legal argument espoused by the defendant. Defendant is subject to the state regulations and those regulations are applied to everyone equally.

Defendant further argues that the state cannot prove the "conservation necessity," as if those efforts were discontinued the elk population would continue unaffected by unlimited hunting. In fact, even the Crow Tribe does not allow such unrestricted hunting in that part of the Big Horn Mountains which are within the Crow Reservation. There are conservation efforts on the reservation. *See* State's exhibit 19, (Article 12, *The 2005 Crow Law and Order Code*). It is unreasonable for the defendant to believe or to even argue that he and other members of the Crow Tribe may hunt any game within the BHNF without restriction. *Repsis* at 992. If not for the continuing conservation efforts there would be no game to hunt.

Further, if the Crow Tribe had off-reservation treaty hunting rights, the tribal government recognizes the need for conservation and regulation of

that hunting privilege. The Crow Tribe Legislature passed a joint resolution in 2013 to include regulation of off-reservation treaty hunting rights. *See* Defendant's affidavit of Timothy P. McCleary, Ph.D. exhibit 9.[4] This type of regulation is already practiced by other Indian Tribes in this state and others. *See,* State's exhibits 25-27 *(Shoshoni and Arapaho Tribes Fish and Game Code,* Title XVI 2004; Wolf Management Plan for the Wind River Reservation Shoshoni and Arapaho Tribal Fish and Game Dept.; 1982 Plan for the Management of Wildlife on the Wind River Indian Reservation.) More specifically the Indian tribes of the Great Lakes area have regulation of off-reservation treaty hunting, gathering and trapping. *See,* Great Lakes Indians Fish and Wildlife Commission as to off-reservation treaty hunting at http://www.glifwc.org/Regulations/regulations.html. Conservation is necessary and is a continuing necessity.

CONCLUSION

From *Repsis* we know that the off-reservation treaty hunting rights for the Crow Tribe no longer exist. Those hunting rights were temporary and ended upon the occupation of the BHNF. The Defendant has offered no valid legal argument that the interpretations of the hunting rights language in Article 4 of the 1869 Treaty is in error. That treaty has been interpreted and this Court will follow that interpretation.

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[4] This Court could find no evidence that such amendments to Article 12 of the Crow Law and Order Code have been made.

Even if the Defendant can persuade a higher court to find differently, the right to hunt on or off the reservation would be regulated as to when, where and how. Elk migrate and presumably they migrate in the Big Horn Mountains between the BHNF and the Crow Reservation. *See, e.g. Repsis* (the issue regarding a game fence which arguably was an attempt to keep the elk from moving onto the Crow Reservation from Wyoming). The Crow Tribe conservation efforts regulate hunting on the reservation and would regulate hunting off of the reservation if that right existed.

Moreover, it is this Court's belief that the makers of the 1868 Treaty were contemplating the off-reservation treaty hunting rights for tribal members for subsistence by traditional means. The Supreme Court of Washington believed, as does this Court, that a "tribe never contemplated a right to hunt beyond what naturally existed; and they have no right to hunt at the expense of the state." *Dept of Game v. Puyallup Tribe, Inc.*, 548 P.2d at 1070-72. The 1868 Treaty writers could not have foreseen high powered, scoped rifles which make taking game much easier. Nor would they have allowed such hunting rights for the purpose of taking antlered elk heads as trophy. Without regulation the high powered weaponry could assist a hunter or hunters in decimating a herd of elk within a few minutes. Conservation is a necessity and the defendant, whether a Crow Tribal member or not, is subject to regulation. A hunter is regulated by the *Crow Tribe Law and Order Code* when hunting in the Big Horn Mountains on the Crow Reservation in Montana. He is likewise subject to Wyoming Game

and Fish regulations when hunting in the Big Horn Mountains located within the BHNF in Wyoming.

Simply put, if not for the conservation efforts by the state governments, the federal government and the Indian tribes there would be no game to hunt. It is only the efforts of the State of Wyoming and the Crow Fish and Game Department that have caused the elk population to be sustainable in the BHNF and on that portion of the Big Horn Mountains that are located in Montana.

IT IS THEREFORE ORDERED that the defendant's motion to dismiss is DENIED.

IT IS FURTHER ORDERED that the evidentiary hearing scheduled for November 16-17, 2015 is hereby stricken and a pretrial order will issue.

IT IS FURTHER ORDERED that the State's Motion in Limine filed on August 20, 2015 is GRANTED.

Dated this 16th day of October 2015.

[handwritten: signature]
Judge of the Circuit Court

[handwritten: scan 10-16-15 nv]

cc: ✓ Christopher LaRosa
✓ Kyle Gray

Appendix D

U.S. Const. art. VI, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the in the Constitution or Laws of any State to the Contrary notwithstanding.

Appendix E

Treaty with the Crow Indians, 15 Stat. 649 (1868)

. . .

Article 4. The Indians herein named agree, when the agency-house and other buildings shall be constructed on the reservation named, they will make said reservation their permanent home, and they will make no permanent settlement elsewhere, but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.

. . .

Appendix F

Act to Repeal Timber-Culture Laws, 26 Stat. 1095 (1891)

. . .

Sec. 10. That nothing in this act shall change, repeal, or modify any agreements or treaties made with any Indian tribes for the disposal of their lands, or of land ceded to the United States to be disposed of for the benefit of such tribes, and the proceeds thereof to be placed in the Treasury of the United States; and the disposition of such lands shall continue in accordance with the provisions of such treaties or agreements except as provided in section 5 of this act.

. . .

Sec. 24. That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.

. . .

Appendix G

Presidential Proclamation No. 30, 29 Stat. 909 (Feb. 22, 1897)

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

Whereas, it is provided by section twenty-four of the Act of Congress, approved March third, eighteen hundred and ninety-one, entitled, "An act to repeal timber-culture laws, and for other purposes", "That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof";

And whereas, the public lands in the State of Wyoming, within the limits hereinafter described, are in part covered with timber, and it appears that the public good would be promoted by setting apart and reserving said lands as a public reservation;

Now, therefore, I, Grover Cleveland, President of the United States, by virtue of the power in me vested by section twenty-four of the aforesaid Act of Congress, do hereby make known and proclaim that there is hereby reserved from entry or settlement and set apart as a Public Reservation all those certain tracts, pieces or parcels of land lying and being situate

in the State of Wyoming, and within the boundaries particularly described as follows; to-wit:

. . .

Excepting from the force and effect of this proclamation all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States Land Office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired; and all mining claims duly located and held according to the laws of the United States and rules and regulations not in conflict therewith;

Provided, that this exception shall not continue to apply to any particular tract of land unless the entryman, settler or claimant continues to comply with the law under which the entry, filing, settlement or location was made.

Warning be hereby expressly given to all persons not to enter or make settlement upon the tract of land reserved by this proclamation.

In witness whereof, I have hereunto set my hand and cause the seal of the United States to be affixed.

Done at the City of Washington this 22d day of February, in the year of our Lord one thousand, eight hundred and ninety-seven, and of the Independence of the United States the one hundred and twenty-first.

GROVER CLEVELAND

By the President:

RICHARD OLNEY

Secretary of State.